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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1959

DALTON STOCKER, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

REFERENCE TO OPINION DELIVERED IN COURT BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals is number 12715, and at the time of this writing is as yet unreported. Said opinion is appended hereto as provided by rule.

II.

JURISDICTIONAL STATEMENT

A. The decision of the Court of Appeals as to entrapment is in conflict with the applicable decisions of this Court on the same matter, in the case of (*Sherman v. U.S.*) reported in 356 U.S. 369, and in the case of (*Sorrells v. U.S.*) reported in 287 U.S. 435.

The decision of the Court of Appeals as to the admission of evidence of other crimes and offenses is in conflict with the applicable decision of this Court in (*Sherman v. U.S.*) 356 U.S. 369, and is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of (*Sang Soon Sur v. U.S.*) reported in 167 F. 2d 431, and the decision of the Court of Appeals for the District of Columbia Circuit in the case of (*Harper v. U.S.*) reported in 239 F. 2d 945.

The decision of the Court of Appeals in sanctioning the admission into evidence in the government's case in chief evidence of other crimes and offenses for which the defendant had never been charged, prosecuted or convicted, in an attempt to justify to the jury the government's solicitation of the defendant to commit the offenses for which he was on trial, stripped the defendant of the presumption of innocence to which he was entitled and sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

B. The Court of Appeals for the 7th Circuit upheld defendant's conviction in a decision rendered and filed on the 13th day of January, 1960. Defendant's petition for rehearing was denied on the 16th day of February, the

mandate was stayed for a period of thirty (30) days to allow the defendant time to petition this Court for a Writ of Certiorari.

C. The Statutory provision believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

III.

QUESTIONS PRESENTED FOR REVIEW

A. Entrapment.

Whether or not the Federal Government may prosecute an individual for violations of the Migratory Bird Treaty Act when a Federal Officer and Agent sought out an individual not then engaged in the unlawful sale or possession of wild ducks, and by solicitation and deceitful persuasion lured said individual into making contacts for the Officer and Agent and from which said contacts the Agent made purchases of wild ducks?

B. Evidence of other crimes and offenses.

Whether or not the Government may in its case in chief, where the defendant has never taken the stand, justify to the jury its solicitation and inducement of the defendant to violate the law, by introducing in its case in chief evidence, composed of a narrative statement by the Federal Officer of conversations with the defendant, of other crimes and offenses for which the defendant was never arrested, charged, tried or convicted, such evidence being elicited by the government prosecutor from the Federal Officer?

IV.

STATUTORY VIOLATION CHARGED

Defendant was convicted of twelve violations of the Migratory Bird Treaty Act, Title 16 U.S.C.A. Sec. 703, which reads as follows:

> "703. Taking, killing or possessing migratory birds unlawful.
>
> Unless and except as permitted by regulations made as hereinafter provided in sections 703-711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. July 3, 1918, c. 128, 2, 40 Stat. 755; June 20, 1936, c. 634, 3, 49 Stat. 1556."

V.
STATEMENT OF CASE

Defendant, DALTON STOCKER, was charged by way of four informations with violations of the Migratory Bird Treaty Act for possession and sale of wild ducks. Title 16, United States Code Section 703, in the United States District Court for the Southern District of Illinois, Southern Division, for various offenses alleged to have occurred in the jurisdiction of the above mentioned District Court.

These four informations charged him alone in one information and jointly with another in each of the other informations. Defendant was tried alone on these four informations consolidated for trial and was convicted by a jury of eleven counts contained in these informations.

The government's chief witness was Anthony Stefano, an undercover agent for the Department of Interior, Fish and Wildlife Service. For the purpose of his activities, Mr. Stefano assumed the name of Mark DiMarco and posed as a factory representative of the Louver Manufacturing Company.

All evidence relating to possession and sale by the defendant came from this government officer. At the trial, defendant did not take the stand in his own behalf.

Defendant, as grounds for this petition, states that the government's own evidence shows entrapment as a matter of law, and further that the government introduced hearsay evidence of supposed crimes and offenses in its case in chief solely for the purpose of creating prejudice against him by the jury.

In calling the Court's attention to the testimony on these points we will refer only to the government's brief and appendix printed for the use of the Lower Court.

However, it is suggested that the Court, by considering both briefs and abstracts, will be better able to see the vicious manner in which this trial was conducted, and will be better able to see the dangers to our form of government if administrative agencies are left uncontrolled in investigations by the agency.

As to the matter of entrapment, the following evidence is called to the Court's attention.

THE FIRST CONTACT WITH THE DEFENDANT:

"Well, I was going through Beardstown [redacted] my way to Quincy; so I stopped, and telephoned [redacted] Stocker, and I told him I was a duck hunter. I was on my way hunting ducks and I asked him whether he took duck hunters out." (Government's Brief for Appellee and appendix, p. 29.)

THE SOLICITATION AT THE NEXT CONTACT:

"And, in the course of the conversation, I told him that I had hunted in Quincy and that I hadn't had any luck, and that I hated to go home without any ducks, and I asked him whether or not he had any ducks, and he said no, he didn't have any, and he said that he didn't know of anyone in Beardstown that had killed any ducks up to that date." (Brief for Appellee and appendix, p. 31.)

THE MONETARY INDUCEMENT:

"Well, I told him that, of course, I expected to pay for ducks, ..." (Brief for Appellee and appendix, p. 31.)

KNOWLEDGE THAT DEFENDANT NOT THEN ENGAGED IN CRIMINAL ACTIVITY CHARGED:

". . . Then he told me that he had done a lot of market hunting in the past, and that he always received a good price for his ducks. He said, however, he did this, he said, lately I have cut it out because I have a good job in Chicago, but he said, I'm going to go back into it because they are getting a pretty good

price for ducks around Beardstown." (Brief for Appellee and appendix, p. 32.)

FURTHER SOLICITATION:

"Well, I mentioned to Mr. Stocker, that I could use more than eight ducks." (Brief for Appellee and appendix, p. 39.)

On the matter of prejudicial evidence elicited from the government officer as to a narration of the conversations with the defendant, the Court's attention is called to the following:

UNRELATED CRIMES AND OFFENSES:

". . . Then he told me he had done a lot of market hunting in the past and that he always received a good price for his ducks." (Brief for Appellee and appendix, p. 32.)

"Well, he suggested that I get in touch with him. He again repeated that he had done a lot of market hunting and that he always got a good price and he got $2.00 when he hauled his ducks to Chicago, and he got $1.75 when he took his ducks to Springfield." (Brief for Appellee and appendix, p. 41.)

This evidence was reemphasized on the following page of the government's brief and appendix.

"I then asked Mr. Stocker whether or not the story that I had heard around Beardstown that at one time he had pulled a gun on two Federal Agents was true—.

Mr. Weiner: I'm going to object.

The Court: Well, if it was a conversation with him as part of this transaction, I think it is admissible. Overruled.

The Witness: And, he said, and he repeated that, or he said that at one time he had come in with a boat load of ducks, and two Federal Agents had jumped him as he was approaching the shore, that he raised his gun and said, 'Now, you git.' And, he said they got. And, then he took the ducks, put them in the trunk of his car, and went to Chicago and sold them." (Brief for Appellee and appendix, p. 83.)

VI.

ARGUMENT

Petitioner claims that as a matter of law, the government's own evidence shows entrapment. As it is in most cases where the government is the moving party in procuring the commission of the crimes with which the defendant is charged, the question of the propriety of showing propensity to commit a crime also becames an issue.

In the recent case of (*Sherman v. United States*) 356 U.S. 369, this Court held that on the government's own testimony there was entrapment as a matter of law. In the *Sherman* case, the majority of this Court refused to reassess the doctrine of entrapment as set forth in (*Sorrells v. United States*) 287 U.S. 435, although strongly urged to do so in a concurring minority opinion.

However, under the rulings in both of these cases, all the necessary elements to establish entrapment are here present. There can be no question that the criminal design in the present case originated with the officers of the government. The government's own testimony shows that the defendant was not engaged in the type of criminal activity with which he is charged when first contacted by the federal officers. The evidence conclusively shows that notwithstanding this knowledge, the government played on his weakness, and induced him to return to violations by the offer to pay high prices for the procurement of wild ducks. The type of activity in which the defendant was induced to engage is referred to as "market hunting." It is interesting to note that there is not one shred of evidence to show a market for wild ducks except that market created by the government itself.

If the government had not created a market, there would be no reason for the unlawful procurement. It is strongly urged that the present case shows entrapment more clearly than the *Sherman* case, as here the government official made the contacts and purchases himself and there can be no disclaimer of his activities.

The government in order to justify its activities sought to show to the jury what a scoundrel the defendant had been in the past. Such a showing of other unrelated offenses has been condemned in other circuits in (*Sang Soon Sur v. United States*) 167 F. 2d 431, and (*Harper v. United States*) 239 F. 2d 945.

In the present case, the government went even further than it did in the *Sherman* case. In the *Sherman* case the government introduced into evidence the record of two past convictions. This, it is conceded, is the usual method employed to impeach a defendant who takes the stand.

In the present case, the government did not introduce records of past convictions, but merely elicited from the government official conversations supposedly had with the defendant which tended to show past criminal activity, and which in no way tended to prove the present charges and which could only create prejudice against defendant in the minds of the jurors. This is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court said in the *Sherman* case, "The case at bar illustrates an evil the defense of entrapment is designed to overcome." However, to allow such a departure from the accepted manner of judicial proceedings as is present in the instant case, because the government instigated the crimes charged, creates an evil just as dangerous and

obnoxious to our form of government as the original solicitation by the government.

To sanction the procedure followed in the present case, would allow the government in all cases to proceed on the theory that the question of entrapment was involved: That being so, they would not then be limited to the usual methods of impeaching the character of the defendant. They could in all cases destroy the presumption of innocence in their case in chief. The presumption of innocence and the right of the defendant to be proven guilty of the precise crime with which he is charged are fundamental to our criminal jurisprudence. The courts should ever be alert to the dangers which exist when administrative agencies establish their own police departments, and are allowed to proceed on their own self-appointed standards.

This writer as a lawyer, as a citizen and as a veteran of World War II is aware of the many dangers to our form of government. The citizens of this country have placed their trust and confidence in this great tribunal to protect their individual rights from oppressive acts of the government. The principle involved here is important to all the people of this country and is not limited to this defendant.

Respectfully submitted,

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